IN THE

Supreme Court of the United States.

DECEMBER TERM, 1866.

JAMES T. SOUTTER AND SHEPHERD KNAPP, SURVIVORS OF GREENE C. BRONSON, DECEASED, APPELLANTS,
vs.
MILWAUKEE AND MINNESOTA RAILROAD CO. } No. 203.

BRIEF FOR APPELLEE.

The appellants are trustees in land grant mortgage on Western Division La Crosse and Milwaukee Railroad.

The appeal will be found on p. 2, *Trans. No.* 203.

It was taken July 15, 1865, from—

1. Report of masters, October 7, 1861, p. 115, *Trans. No.* 159;

2. Order of District Court, January 7, 1862, overruling the exceptions of appellants to that report, p. 136, *Trans. No.* 159;

3. Final decree, January 13, 1862, p. 428, *Trans. No.* 159.

The masters reported—p. 118:

"We have also ascertained the whole amount of rolling stock on the whole road at the cost price. The amount thereof, was at the date of the filing of the bill of complaint in this cause, five hundred and sixty-nine thousand six hundred and thirty-five dollars and seventy-eight cents; and an additional amount of fifty-three thousand six hundred dollars has been purchased since the filing of the bill of complaint, making the whole amount $623,235.78."

"And we have ascertained and do further report that of the said rolling stock *forty box cars*, amounting at the cost price thereof to $31,979.64, and numbered, (*setting them out*,)

are covered by and included in the mortgage executed to the complainants as set forth in the bill of complaint in this cause; the said cars having been purchased with and by the proceeds of a portion of the bonds to which this mortgage is collateral; *and all the remainder of the said rolling stock is covered by and included in the first mortgage upon the said railroad, and in the mortgage upon the said railroad executed to Greene C. Bronson and James T. Soutter*, and bearing date on the seventeenth day of August, A. D. 1857."

The appellant's fourth exception to the report, (p. 133,) was as follows:

"4th. For that the said master and special masters have in and by their said report certified that *all the rolling stock on said road* (except forty box cars which are specially named in said report) *was covered by and included in the first mortgage* upon the said railroad, and in the mortgage upon the said railroad executed to Greene C. Bronson and James T. Soutter, and bearing date on the 17th day of August, A. D. 1857."

Whereas the said master and special masters ought to have certified that all the rolling stock on said road (except that purchased by the receiver, since the commencement of this suit, amounting to the sum of $53,600) was covered by, and included in, the mortgage given to the said cemplainants, and described in the bill of complaint in this cause, and that said mortgage was a first and prior lien on said rolling stock, superior to all other liens; and that as to the rolling stock purchased by said receiver above mentioned, 105 to 200 thereof was covered by the mortgage described in the complaint, and that to that extent the complainant's said mortgage was a first lien thereon.

The order of Court upon the exceptions contains the following, (*p.* 136:)

"And it is further ordered by the Court that the fourth exception of complainants be, and is hereby overruled as to the forty box cars, which are covered by their mortgage. And it is further ordered by the Court, that on said exception the said report be so modified that *all the other rolling stock that was on said road when the receiver was appointed, except the said forty box cars*, is covered by, and included in the

first mortgage of the road from Milwaukee to Portage City; and that all the rolling stock on said road that has been purchased or procured since the Court has held possession, by it received, costing $147,942.63, be applied to the said mortgage, in this bill, in proportion to the net revenues on such portions of the road said mortgages respectively covered since the appointment of the receiver."

I

It is important *in limine* to understand who are the parties litigant on this appeal, their respective interests, and how far such parties are bound by the decision of this Court in this suit, in 2 Wallace, 609, and what remedies this Court may administer on this appeal. These determined, everything becomes very simple.

FIRST.

The parties—

a. The appellants are the plaintiffs in the foreclosure suit below, and are the trustees in the land grant mortgage.

b. The respondents are the defendants in that suit including the Milwaukee and Minnesota Company. The purchasers under the decree are not parties to this appeal, and cannot therefore be bound by the decision thereof.

SECOND.

The real interests of the parties—

a. The obvious and true interest of the appellants is to establish that only a part of the premises covered by their mortgage has been sold, and that they have a right to have the part omitted sold, or else the whole sale set aside, and the part previously sold and the omitted part sold together, (which latter course it will be shown is beyond the power of the Court.)

b. The interest of the Minnesota Company as owner of the equity is to have it established, that all the premises mortgaged have been sold, and that of the rolling stock that came to the hands of the receiver, only forty box cars were covered by the mortgage.

c. The St. Paul Company, the actural purchaser, is not represented on this appeal, is not a party to the suit, and

has no interest in having the sale, or the decree directing the sale, disturbed; and whatever interest it has, is not only not represented by the appellants, but the interest of the latter on this appeal is hostile to the St. Paul Company.

THIRD.

How far has 2 Wallace, 609, (a decision in this very suit,) settled anything?

What position may we safely take from that decision as a starting point?

That case was a supplemental bill in the nature of an original bill, brought by the Minnesota Company, to have settled the very questions sought to be determined on this appeal. The bill set forth all the mortgages on both divisions, (this record does not contain them all,) and made parties defendant the present appellants and the St. Paul Company, which is another advantage that case has over this appeal. After the decision in 2 Wallace, 642, remanding that case, an answer was put in, and the case is here again on the respective appeals of the St. Paul Company, the Minnesota Company, and the trustees under the land grant mortgage, being Nos. 416 and 418 on the docket, December T., 1866.

Now, the Court in their opinion say, *p.* 632:

"The present suit is really a continuation of that one," (meaning the foreclosure suit in which the present appeals are brought.)

"The rights of the parties depend upon the construction which is placed upon the acts of the Court in it; and the present bill is necessary in order to have a *declaration of what was intended by the orders and decrees made in that suit*, and to enforce the rights which were established by it."

Again, speaking of the outrageous, unjust, and illegal orders by which the St. Paul Company obtained possession of the whole rolling stock, the Court, after having pronounced these orders illegal, say, *p.* 633:

"An unjust advantage has been obtained by one party over another by a perversion and abuse of the orders of the Court, and the party injured comes now to the same Court to

have the abuse corrected, and to carry into effect *the real intention* and *decree* of the Court, and that while the property, which is the subject of contest, is still within the control of the Court and subject to its order."

Again the Court say, (I quote from the unabreviated opinion of the Court—See *p.* 164, Record No. 416:)

"In reference to the road-bed, which is covered by these various mortgages, there is no diversity of opinion; but in reference to the rolling stock it is contended by the appellees that these several mortgages were *successive liens* on *all* the rolling stock of the Company, and by appellants that they are liens *only* on the rolling stock *belonging* to, or *in some way identified with, that part of the road included in each mortgage respectively.* At first blush, it would seem that in a road used continuously as one road, there could be no such definite relation between any particular division of the road and any particular portion of the stock.

"*But as it was competent for the Company which owned all the road and all the stock, to assign certain stock to one division, and certain stock to the other division,* when the road was divided for the purpose of making mortgages, we cannot assume as a fact that there was no such division of the rolling stock; but must look to the language of the mortgages themselves to see if any such intention is expressed. If it is not, then obviously the other view prevails, and the mortgages are successive liens on the whole stock.

"The descriptive part of the Palmer mortgage is in the following words:

"'All their said road, from its eastern termination in the City of Milwaukee to Portage City, in the county of Columbia, being ninty-five miles in distance, constructed and to be constructed, together with all and singular the railways, land procured or occupied, or so to be for right of way within the limits aforesaid, together with bridges, fences, privileges, rights, and real estate owned by said Company for the purposes of said road, or which may hereafter be acquired or owned by them within the limits aforesaid, and all the tolls, income, issues and profits to be had from the same, and all lands used for and occupied within the limits aforesaid, by depots or stations, with all buildings standing thereon, or which shall be procured therefor, together with all locomotives, engines, and tenders, passenger cars and freight cars, shops, tools, and machinery now owned, or hereafter to be acquired by said Company, and in any way belonging or

appertaining to said railroad now constructed and to be constructed within the limits aforesaid, including all its property, real and personal, pertaining to said railroad within said limits, and all its rights, credits and franchises thereunto appertaining.'

"The corresponding part of the mortgage on the Western Division is as follows:

"'All and singular the several tracts, pieces or parcels of land which are now or may hereafter be, or constitute the site of the road, way, turnouts, engine houses, workshops, depots, and other buildings, and all the other improvements on or pertaining to said roads, whether now built and made or to be built or made hereafter; and also all and singular the locomotives, engines, and other rolling stock, and all the other equipments of every kind and description which have already been or may be hereafter procured for or used on said road, or either of them, and all the materials, tools, implements, utensils, and other personal property which have been or may hereafter be procured for or used *in connection with said roads, or either of them*; and also all and singular the rights, liberties, privileges, and franchises of said Railroad Company, of every kind and description, relating to said roads.'

NOTE.—*The "said roads, or either of them,"* refers to the roads—
1. From Madison to St. Croix River, or Lake.
2. From *Portage* to La Crosse. (See p. 11, Transcript, No. 159.)

"The language thus quoted has been the subject of much minute criticism on both sides, and, when considered in reference to the rolling stock alone, may not be free from doubt as to its construction. But when we consider it in reference to the clear purpose of the parties to make the mortgage distinct and different as to everything else conveyed by them, we conclude *that it was intended that the rolling stock covered by each mortgage was that which was properly appurtenant to each particular division of the word.*"

The Court further say, (2 Wall., 636,) that the complainants in this foreclosure suit, by omitting to make the mortgage on the Eastern Division parties defendants, "show their own construction that their mortgage, and that of Bronson and Soutter, did not cover the same stock, *which would only be because it was appurtenant to the Eastern Division.*"

Again the Court say, p. 636:

"About the time that foreclosure suit was commenced, (meaning the foreclosure on the Western Division,) a suit was instituted in the same Court to foreclose the second, or Bronson and Soutter mortgage, on the Eastern Division, but the holders of the Palmer mortgage were not made defendants on either suit. The two suits progressed *parti passu* to a final decree, but while the Western Division went to sale, an appeal stayed proceedings in the Eastern Division case, and no sale has yet been made under that decree. Very shortly after these suits were commenced, the Court made an order of reference in each of them to masters in chancery, who were the same masters in both cases. These references were for the purpose of ascertaining the amounts due on these bonds, the amounts due certain judgment creditors, *and the amount of rolling stock on the whole road, and the amount included in each mortgage.*

"The language of the order of reference on the latter point in the original suit in the case is as follows:

"'And it is further ordered that masters ascertain and report the whole amount of rolling stock on the road, and that they specify the quantity thereof *that is covered by this mortgage*, also in the *first and second mortgages respectively*.

"'The reference in the other case is in language almost identical.

"'Now it is argued that the object of this order was to ascertain and settle the *priorities* between these different mortgages. No such inference can be made from the language, for it says nothing about priorities in date, or superiority of lein. There was no occasion or reason for ascertaining those priorities in that suit, *for the respective parties were not before the Court, and could not be bound by its decree.* It would not even bind complainants, because there would be no mutuality in the estoppel. It is an impeachment of the legal attainments of the Court, and of the counsel, to suppose that they would make a reference to a master to ascertain a fact which could have no influence on the suit, and, if passed upon by the Court, could effect nobody's interest in the slightest degree.

"'But the language of the order clearly implies a different thing. The object is to ascertain *what is covered by one mortgage to the exclusion of the other;* an object which had manifest pertinency to the duty which the court was called upon to discharge. The judge who made these orders delivered an opinion at the trial, in which he decides that the rolling stock of a railroad is a fixture; and if we sup-

pose him to have considered that which was mortgaged to Palmer, and to Bronson, and to Soutter, as a *fixture on the Eastern Division*, and that which was mortgaged to Bronson, Soutter, and Knapp, *as a fixture on the Western Division*, we have a clear idea of what he wished to ascertain, in view of the decision he was to make in the two suits.' "

The opinion then states the reports of the masters and the exceptions taken thereto, the overruling of the same, and proceeds, p. 639 :

" We regard this as a judicial decision, that complainant's mortgage did not cover the rolling stock which was covered by the previous mortgage to Palmer, and that it only covered the forty box cars, and such proportion of the rolling stock purchased by the receiver as the net earnings of the Western Division. This order modifying and confirming the report of the masters settled the rights of the parties, and by that decision they must stand until it is reversed on appeal, or set aside by some direct proceeding for that purpose.

" The final decree ordering the sale proceeds upon the same view of the rights of the parties. After ordering a sale of the property mortgaged, and copying the language given in the mortgage, as descriptive of what was mortgaged, the decree adds :

" ' With forty box cars, &c., and such portion or share of the rolling stock purchased and procured by the receiver, costing $147,942.63, as the net revenues of the portion of the road covered by this mortgage bears to the balance or other end of the road since the appointment of the receiver. The remaining rolling stock is subject to a prior mortgage.

" ' That is to say, having decided that what is covered by the other two mortgages is not covered by this ; it is not subject to sale in this suit.

" ' The marshal, however, who was directed to make the sale, instead of a master commissioner, did sell all the rolling stock, and that sale was confirmed by the order of the District Court of May 5, 1863.

" ' It is too clear for argument that a sale by the marshal, authorized by a decree, is without any validity. Does the order of the Court confirming the sale make it valid?

" ' Upon principle the question is by no means free from difficulty. We are clear that a sale without a decree to sustain it would be a nulity, and we doubt if a Court can make

it valid by a mere general order of confirmation. If, however, an issue had been made by exceptions or other proper pleading, as to the question whether any particular piece of property had been included in the *decree or order of sale*, and the Court had decided that it was so included, it might be an abjudication upon the construction of the decree which would bind the parties. Nothing of the kind occurred here. *There is every reason on the contrary to believe that the Court had no suspicion that the marshal had sold more than the decree authorized.*

"'On the 7th day of May, two days after the order of confirmation, the Milwaukee and St. Paul Railway Company presented their petition for the discharge of the receiver, and for possession of the property which they had purchased. The Court thereupon made an order "that the receiver deliver over to the said Milwaukee and St. Paul Railway Company the said road and appurtenances, being Portage City and La Crosse, *and the rolling stock and property specially described in the decree.*" The only rolling stock specially described in the decree was the forty box cars, and the proportion of stock purchased by the receiver.

"'The fact that this was ordered to be delivered to the purchasers and no more, is almost conclusive of two things: first, that the judge understood his decree and previous rulings as we have interpreted them; and second, that he had no idea that he had confirmed the sale of all the rolling stock on the road to the purchasers at the sale. It is true, that over a month later he ordered the Eastern Division of the road, and the remainder of the rolling stock into the possession of the same Company. But this was *done to enable them to run the whole road as a through route, on the principle of public policy, and that it was better for all parties concerned. This he declared in an opinion delivered at the time, and it is substantially indicated in the orders themselves.*

"'In the light of these facts, we cannot give to the order of confirmation in this case the effect of making valid the marshal's sale, however the rule might be on that subject in other cases. But we do not mean to intimate that in any case a sale by a marshal, or master in chancery, can be valid, when there is no decree to support it. Cases in this Court (Schriver v. Lynn, 2 Howard, 43; Brignardello v. Gray, 1 Wallace, 627,) would seem to indicate that it cannot.'

"The order of June 12, 1863, delivering possession of this property to the Milwaukee and St. Paul Railroad Company, has been declared by this Court to be void for the want of

jurisdiction, and has been set aside by this Court which made it. It therefore affords no support to defendants in this claim to the rolling stock in dispute.

"We have thus examined, with care and patience, *the mortgage*, and the various orders and decrees of the District Court, on which the claim of the Milwaukee and St. Paul Railroad Company to the ownership of this property depends. There is in all of them some want of clearness and precision, including the mortgage itself. Before the Court ordered the sale, it should have made clear all the ambiguities. It evidently attempted to do so, and we think if it has not in all cases effected that purpose fully, it has furnished the criteria by which it can be done. And although the language of its orders is not always free from doubt, we have been able to satisfy ourselves of the Court's intentions.

"The title of appellant is clear on the record, unless it has been diverted by these proceedings. We think that they do not confer title to the rolling stock on the Milwaukee and St. Paul Railway Company, nor divest the appellant, except as to the forty box cars, and the proportion of the stock purchased by the receiver, which the net earnings of the Western Division bore to the net earnings of the Eastern Division, *and that they also decide* that the mortgage under which they claim did not include any more."

These things, then, may be considered settled—

1. That there is another suit pending, and which is supplimental to this cause, and is in this Court for review, which this Court pronounced the proper suit to declare "the intention of the orders and decrees in the suit, and to enforce the rights established by it."

2. That the land grant mortgage and the first mortgage on the Eastern Division covered only rolling stock appurtenant to each separate division of the road, and that they were not liens on the same rolling stock, differing in the order of dates, but liens on entirely different rolling stock.

3. That by the reference in this suit and the decree of sale thereon, it was determined that the land grant mortgage covered only forty box cars; that these were all the decree directed to be sold; that so far as the marshal sold more than the forty box cars, his action was invalid, and the order of the Court confirming it did not make it valid.

These propositions were settled in December, 1864, and since then this vast and constantly increasing litigation has been continued in consequence of the contumacious conduct of the St. Paul Company, until at this term there were seventeen cases on the docket of the Court, to say nothing of the numerous cases in the Courts below. Of course the conduct of this litigation and of the parties since December, 1864, has been influenced and determined by the principles thus supposed to be settled; to depart from them now would only aggravate the confusion and ruin that this controversy produces, and open a new and as yet unexplored field of fresh litigation. In this connection it is submitted that the decree and advertisement of sale and the report of sale contained exactly the same description of the premises sold as the mortgage did, in addition to the description of the forty box cars, the latter being connected with the mortgage description by the conjunction "and," (*Transcript* pp. 12, 430, 194*, 196*.)

FOURTH.

What remedies may the Court adminster on this appeal under any and every possible view that may be taken of this case?

In this connection it must be remembered that the appellants made no objection to the sale, went on and enforced their decree, has their sale confirmed, and received the money from the purchaser.

a. The Court cannot set aside the sale. (See the authorities collected in Mr. Cary's brief, p. 39.)

In Bronson *vs.* Railroad, (2 *Black*, p. 530,) the Court say:

"If the decree was reversed, there could be no restitution of the road, its property and franchises, for purchasers at a judicial sale are protected."

b. In the next place it is not exactly the duty of this Court to give the appellant an opinion that the proper construction of the decree of sale was that it included all the rolling stock, and then affirmed the decree, as they are invited to do by counsel for appellants at pages 27 and 28 of his brief. This Court sits to hear and decide appeals, not to

give opinions to parties or to give "authoritative expositions" of the decrees of other Courts.

Besides, in this connection, the question at once presents itself: What interest have the appellants in having the decree construed and explained, and then *affirmed?* Would it put any money in their pocket or advance any interest of theirs?

No one but the St. Paul Company are interested in having this course pursued; The counsel does not represent them on this appeal; They are not a party to it, and would not be bound by any decision made in it.

c. The Court cannot modify the decree by making it include other property, without directing the other property to be sold. The appellants have no interest in such a modification; but only the purchaser, and he has no such right, does not ask it, and is not represented.

d. The inquiry then presents itself: Can the Court modify the decree as the appellants ask, (p. 38 of their brief,) by providing that it shall include the additional rolling stock, and that the marshal proceed to sell the same. We submit that if even there had been error, and the appellant on this record should have had such a remedy and such a decree, he cannot have it now, because he has enforced his decreee and sold the mortgaged premises, which, under the circumstances of this case, and taking into view the character of the property, is a waiver of and a bar to his appeal. It is to be borne in mind that the property that would be thus disposed of on a second sale is rolling stock, comparatively worthless when severed from the road. See the dissenting opinion of Nelson J., 2 Wallace, 642, as to the value of rolling stock severed from a road.

The party upon whom this sacrifice would fall is the owner of the equity of redemption, and it is as much entitled to be protected from such an injury by the principle we invoke as the purchaser in case of a reversal of a decree of sale.

e. Whilst it is conceded that in many cases the enforcement of a decree or judgment will not present or bar an appeal, yet in many other cases the Court hold the appeal

inconsistent with the enforcement of a decree. Where there can be a judgment of restitution, or where no injury is inflicted by the enforcement of the decree that cannot be redressed on its reversal, or, where, as in *Merriam vs. Haas*, 3 *Wallace*, 687, in a foreclosure case, a certain amount is conceded to be due and the plaintiff receives the same, he may still appeal.

But, in a case like this, when there has been stricken from the mortgage premises an item comparatively worthless, if sold alone, the mortgagee has no right to proceed and sell the mutilated railroad and then appeal for the purpose of selling the severed item; but his duty is to redress the error first, as it is the right of the owner of the equity to have the whole sold together.

Taylor vs. Savage, 17 *Peters*, 226.
Bennet vs. Van Syckle, 18 N. Y. Rep., 481.
Vail vs. Remsen, 7 *Paige*, 206.
Ubsdell vs. Roat, 3 *Abbott*, *R.* 143.

The authorities cited by the counsel for appellants do not sustain his 5th point, (page 38,) as a general proposition; they merely show that in particular cases and under particular circumstances a party may enforce a decree and also appeal. As evidence of this, a summary of these authorities is here presented.

Dyett vs. Pendleton, 8 *Cowen*, 326.

After judgment and error brought, no bail being in, the defendant in error sued out a *fi. fa.*, and the plaintiff in error gave his notes for the amount of the judgment, agreeing that it would stand as security, held no ground for setting aside or staying proceedings on the writ of error. Even the payment of the judgment would be no ground for this. Per Jones, Chancellor, and Colden, Senator.

Answer to this case: Not applicable; it being the defendant in the judgment who brought the suit of error, and whom it was claimed had lost his right to appeal.

Clowes vs. Dickenson, 8 *Cowen*, 328.

A party may appeal from a final decree in chancery at any time within five years, though he have accepted the money awarded by the decree.

In this case the chancery decree was for damages, interest, and costs, and the plaintiff appealed because he wanted more. Spencer, Senator, said: In the absence of any adjudged case, I cannot undertake to introduce an exception into the statute allowing appeals and writs of error unless there be some strong reason assigned which shows that such exception would be within the meaning of the legislature. I cannot discover any such reason in the fact that a party accepted what he was entitled to by the judgment of a Court, and which would belong to him in any event, for I cannot admit the correctness of the argument of the counsel of the respondents that this decree may be reversed *in toto*.

Higbie vs. Westlake, 14 N. Y., 281.

A creditor may appeal from a decree of distribution made by a Surrogate, notwithstanding he receives on account of his demand the amount awarded to him by it.

Denio, C. J., says: There is no weight in the objection that the creditors who appealed had received their dividends under the decree of the Surrogate. They were certainly entitled to the amount paid them, and there was no inconsistency on their part in receiving that amount, and then appealing for the purpose of obtaining a reduction of the allowance for expenses which would give them a further dividend.

Erwin vs. Lowry, 7 *Howard*, 173.

When the Court ordered that a sum of money should be paid over by the party in whose favor they decided to the losing party, the reception of this money by the party, before the writ of error was sued out, will not be a sufficient cause for dismissing the writ of error.

In this case, in a petition filed by the successful party, Lowry, an order was made giving the petitioner possession of a plantation and slaves; but requires as a condition that he should pay the defendant (*Erwin*,) $436, or else deposit

it with the sheriff to defendants' credit. Lowry paid it to the sheriff, who paid it to Erwin, and after this Erwin appealed.

Merriam vs. Haas, 3 *Wallace*, 687.

Bill for foreclosure of mortgage for $6,000. Defendant answered, admitting $4,000 with interest due, and submitting to a decree for that amount. Decree for $4,000, with interest; plaintiff appealed. Afterwards there was a sale and report of master; but before it was confirmed, defendant paid amount of decree. Motion to dismiss, appeal denied.

United States vs. Dashiel, 3 *Wall.* 688.

Where a writ of error is taken to this Court by a plaintiff below, who, previous to taking the writ, issues execution below and gets a partial, but not a complete satisfaction on his judgment, the writ will not in consequence of such execution be dismissed.

Mr. Justice Grier, (with whom concurred Nelson and Swayne, J. J.,) dissenting: I think this writ of error ought to be dismissed. The plaintiff having elected to take execution and satisfy his judgment, has no longer any judgment upon which the writ can operate. His election to accept and execute his judgment below is a retraxit of his writ of error. Such has been the unanimous decision of every Court of law that has passed on the question. Appeals in chancery can furnish no precedents for a contrary decision. A decree in chancery may have a dozen different parts, some of which may stand good and be executed, while others may be litigated on appeal; a judgment at law is one thing. The plaintiff cannot divide his claim into parts, and when he obtains judgment for part, accept that part and prosecute his suit for more. Having a right to elect to pursue his judgment or his writ of error, he cannot elect to have both.

In Bronson vs. La Crosse Railroad Company, 1 *Wallace*, 409, which was decided after the decision of the motion to dismiss appeal, (*Merriam vs. Haas*,) the Court (*Nelson, J.*) say:

"Another reason why this particular case is not within the provisions of the 3d of March is that the District Court, even if it had jurisdiction of the proceedings, would not be warranted in taking any steps in the execution of the decree in favor of the appellants. They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it, pending the appeal. They assert that the decree is founded on error, and for that reason should not be executed, but should be reversed and corrected in the appellate tribunal."

It is difficult from the cases to discover a clear proposition which shall determine when the enforcement of a decree or judgment is at bar to an appeal, and probably the safest rule is to consider in each case whether the proceedings are inconsistent, or will work irreparable injury. In *Benkhand vs. Babcock*, 17 *Abb.*, 422, an attempt is made to define the rule by Robertson, C. J., as follows:

"It is claimed by the defendants that the plaintiffs have waived their appeal in this case by accepting from them the amount from the verdict in favor of the latter with costs. Numerous authorities have been cited to us on the argument to sustain that proposition, but they will all be found to be cases where an appellant had attempted *actively* to enforce either the whole of a judgment, order, or decree, in his favor, or else some part thereof, connected with or dependent upon such other part thereof as he may have appealed from, or else where he had availed himself of some benefit or favor granted or offered to him by such judgment, order, or decree, as an alternative to exercising the right of appeal."

This case contains one test which is often applied, *viz:* Whether the *appellant* himself is *actively enforcing* the decree —an important distinction, as in some cases where the appeal was allowed there was a mere *passive* reception of money by the appellant.

f. If the record shows error in the distribution of rolling stock to the different mortgages, it arose on the reference to the master, and it can only be corrected so as at the same time to do justice to the owner of the equity of redemption by setting aside the decree and sale and opening the reference, and having the report corrected and a new decree and sale; and insomuch as this Court can not set aside the

sale, the appellant has lost his remedy by proceeding to the sale.

The mere statement of the appellant's own view of the case is enough to show this:

A mortgage of a railroad, including rolling stock on a reference preliminary to the decree, has the injustice done him of a decision, excluding the rolling stock from his mortgage, and is obliged to take a decree for the sale of the road without the rolling stock. The owner of the equity, a party defendant, has not been instrumental in this, but has allowed the bill to be taken as confessed. Instead of appealing and having the decree corrected, the mortgagee first sells the railroad alone, and then appeals and asks to have the rolling stock sold by itself. What more frightful injustice to the owner of the equity to sell his road and his rolling stock by separate sales? Such a sale would be productive of a great sacrifice in each instance, and, in the case of the rolling stock, ruinous.

No Court of Appeal will do this when ruin and sacrifice are solely caused by the mortgagee's insisting on enforcing an erroneous decree and then appealing from it.

From the foregoing considerations it is claimed that even if there were error in the decree, as to the amount of rolling stock included in the mortgage, the judgment must be affirmed.

II.

There was no error committed in any part of the proceedings in reference to the rolling stock.

1. And under this head we still insist that, by virtue of the decision in 2 Wallace, 609, it is the law of this case, that the land grant mortgage covered only certain rolling stock that was incident to the Western Division, and constituting only a portion of the whole rolling stock of the road, and that all the rest of the rolling stock not covered by the land grant mortgage was covered by other mortgages, and belonged to the Eastern Division.

2. It is submitted that without relying upon 2 Wallace, as *res adjudicata* on this point, the language of the mort-

gages and the word "*roads*" in the land grant mortgage, relating to the Western Division, conclusively prove this. The language of the mortgages is conclusive on this point. (*Transcript, pp.* 11, 12, *No.* 159.)

3. The supplementary mortgage relied on by appellant, and executed after all mortgages on such division were delivered, does not prove a different intent. This supplementary mortgage, the appellant's brief states, was not "counted on" or foreclosed in this action, and is claimed outside of these proceedings to be an unforeclosed mortgage presenting an independent right to the rolling stock; to which claim, when properly presented, there are conclusive answers, some of which are presented in the following extract from the brief of Mr. Carpenter on the motions argued by him at December Term, 1866, (*Original, No.* 10:)

VIII.

The St. Paul Company also pretends that since the adjudication of this Court against its pretentions of ownership to this rolling stock, a new mortgage (which we have elsewhere, and in the proper place, shown to have been a most glaring fraud) has been discovered; which has never yet been foreclosed, and which they claim mortgaged all the rolling stock to Bronson, Soutter, and Knapp.

The answers to this are so numerous that it is difficult to select. A few may be enumerated:

(1.) The mortgage is a mere chattel mortgage, and never was filed according to the statute; and for that reason is, by the statute, declared void as against creditors and *purchasers*. The Minnesota Company is a purchaser, at the forclosure sale, under a subsequent mortgage. This chattel mortgage is therefore wholly void as to said Company.

R. S. Wis., 1858, (re-enactment,) ch. 45, sec. 3.
Cotton vs. Marsh. 3 *Wis.*, 221.

(2.) The mortgage was never renewed by affidavit, as required by statute, and expired in one year from its date, R. S. ch. 45, sec. 5.

(3.) The mortgage itself provides that the property therein conveyed should be held by Bronson, Soutter, and Knapp under their principle mortgage, and that they should sell and dispose of "the same in the same manner, at the same time, and upon the same conditions," as the other property mortgaged, *and not* otherwise.

The trustees sold the other property under the decree obtained upon that mortgage in 1863; and now to authorize them to forclose this mortgage by subsequent and independent proceedings, *would be to override the express provisions of the mortgage itself*, and give the trustees a power under the mortgage, that the mortgage *expressly* denies.

(4.) But waiving all these objections, conceding the validity of the mortgage, and the right of the trustees to foreclose it: how can the St. Paul Company claim any benefit from it? That Company is not the mortgagee, is not an assignee of the mortgage, has no rights and pretends none, except as holder of bonds secured by the mortgage. The Minnesota Company—the owner of the equity of redemption—cannot be deprived of its rights until it is foreclosed; and on the foreclosure of the mortgage, if it should ever be foreclosed, the property must be sold at public auction, and we are as likely to become the purchasers as they are. One of two things is certain; this mortgage either has or has not been foreclosed.

1. If it has been, then it is merged in the Western Division foreclosure decree; and this Court has already decided that the St. Paul Company acquired no title to this property by virtue of their purchase under that decree.

2. If it has not been foreclosed, then the St. Paul Company, which is a purchaser of only what that decree ordered to be sold, can claim no benefit under this mortgage, which was not foreclosed by that decree.

The idea that a purchaser at a sale, on the foreclosure of one mortgage, becomes thereby entitled to claim other property included in another mortgage which has not been foreclosed, rests upon no authority that I know of, except the text, "For whosoever hath, to him shall be given, and he shall have more abundance; but whosoever hath not, from

him shall be taken away even that he hath." This eccentric disposition of spiritual gifts that has troubled commentators not a little, has never been adopted into positive jurisprudence, or applied to rolling stock on a railroad.

3. If it be true, then the appellant had a mortgage which covered a part of the rolling stock of the road, distinguished only as such part as was incidental to the Western Division, and had not already been made incidental to the Eastern Division; the burthen of proof was on the appellants to show how much of the rolling stock their mortgage covered; it was a part of their case that they were bound to make out by affirmative proof.

For this purpose they took an order of reference, and in the vast mass of evidence produced on that reference they have not exhibited any testimony showing that their mortgage covered more than the forty box cars. The only oral testimony given on that point is the following: The appellant called Edwin H. Goodrich, (*Trans.*, *p.* 270,) who in his direct examination testified, *p.* 272:

"At the date of the first mortgage there was no rolling stock on hand, June 30, 1854. At the date of the mortgage to Bronson and Soutter, August 17, 1857, the cost of the rolling stock on hand was $544,492.16. At the date of the land grant mortgage, 31st of December, 1856, the rolling stock on hand cost $455,001.06. At the date of the order of reference in these causes, 11th of March, 1861, the cost of the rolling stock on hand was $623,235.78. None of the rolling stock was purchased with land grant bonds, but part of it was paid for with the proceeds of the land grant bonds. *Out of the proceeds of those bonds (issued under the mortgage to Bronson, Soutter and Knapp)* $3,000 was paid for the right to use a car brake, and $31,979.64 *was paid for forty box cars.*"

Mr. Goodrich also testifies, (*p.* 179, *Transcript*):

"The *Western Divison* is charged for *the use of the rolling stock*. We charge it two cents a mile for passenger and baggage cars, one cent a mile for freight cars, and five cents a mile for locomotives, for every mile run on that division of the road, in addition to the expenses of repairs."

See accounts, (*pp.* 182, 183, *Transcript.*)

In this connection it is proper to notice that the bill states that when the land grant mortgage was executed the Western Division was not constructed, (*Transcript, p.* 5,) but the Eastern Division was then constructed and in operation, (*Transcript, p.* 3.) The Western Division was not completed till October, 1858, (*p.* 5.) Of course, therefore, all the rolling stock belonging to the company, except the forty box cars, was attached and appurtenant to the Eastern Division, and was purchased with the proceeds of the mortgages on that division.

In giving this evidence the appellants showed their approval of the natural equity suggested by the district judge, and attempted to use it to show to what extent their mortgage covers rolling stock. The appellants, putting on that ground, ought not now to be allowed to say that the evidence is insufficient, or the theory wrong; and if, as the fact is, this whole record, from beginning to end, contains no other affirmative evidence, showing that the appellant's mortgage covered more than these forty box cars, they cannot complain that no more were allowed to them, excepting upon the false notion of their Brief, that they were entitled to the whole rolling stock of the road, unless some of the owners or lien holders of a portion of the rolling stock, not parties to their action, came before the masters and showed affirmatively how much of the stock belonged to and was covered by their liens. This would be to shift the burden of proof from the appellant where it belongs upon the shoulders of those not parties litigant in this suit.

4. I have thus far considered this branch of the case as if the transcript contained all the evidence which was given before the masters, but it is apparent from the report of the masters, (*Transcript, pp.* 115, 118,) that they had in evidence before them the other mortgages on the Eastern Division, and took other testimony which is not on record.

The attention of the Court had early in the suit been called to the subject by the receiver. (*Transcript, pp.* 48, 51.)

The order of reference (*Transcript, p.* 112) required that the masters should consider the question.

Frequent mention is made of the several mortgages on the separate divisions.

It is submitted that this Court might with equal propriety set aside the findings of a jury upon questions of fact as against the weight of evidence, where there is no bill of exceptions or case containing the whole evidence, as to reverse the report of the masters on this finding of fact upon the partial and imperfect return of the evidence before them.

FINALLY.

There must come a time in all cases when there must be an end of litigation, even in this case, and the end of litigation in it can be only reached by adhering to the principle *stare decisis*. To depart from that principle will engender a litigation not only interminable but ruinous to all parties concerned. The Court therefore should adhere as far as possible to the uniform course of decision of the district judge, and of the circuit judge, and the principles laid down in their opinions, so far as they have been recognized and adopted by the decision of this Court in this litigation. To depart from them will not only produce the injury and inconvenience already pointed out, but will present this singular and much to be avoided result: (1) The mandate of this Court in the Eastern Division suit, directing that the whole of the rolling stock, excepting forty box cars, should be delived up to the owner of the Eastern Division, on the faith of which mandate between four and five hundred thousand dollars have been paid, and (2) an utterly conflicting mandate in this case, taking away all the rolling stock from the Eastern Division, and the owners and parties interested therein, and giving it to the parties interested in the Western Division, not litigant in this appeal or bound by the decision thereof.

H. A. CRAM,
Council for Appellees.

Case No. 243

Supreme Court of the United States

No. [illegible], 161, 62, 152, 153, 249, 251, 252, 253

DECEMBER TERM, 1907.

MILWAUKEE & ST. PAUL RAILWAY [illegible]

vs.

MINNESOTA & MANITOBA RAILROAD [illegible]

In the [illegible]